

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SUZANNE D. JACKSON,

Plaintiff,

v.

WILLIAM FISCHER, et al.,

Defendants.

No. C 11-2753 PJH

**ORDER GRANTING MOTIONS TO
DISMISS IN PART, AND DENYING
THEM IN PART**

The motions of defendants Jon Sabes ("J. Sabes"), Steven Sabes ("S. Sabes"), Marvin Siegel ("Siegel"), Mani Kulasooriya ("Kulasooriya" – sued as Mani Koolasuriya), Monvia LLC ("Monvia"), New Moon Girl Media, Inc. ("New Moon" – sued as New Moon LLC), and Jorge Fernandes ("Fernandes") to dismiss the claims asserted in the third amended complaint ("TAC") came on for hearing before this court on September 25, 2013.

Plaintiff Suzanne D. Jackson appeared by her counsel Alan Kaufman and David Snyder; defendants J. Sabes, S. Sabes, and Siegel appeared by their counsel Tanya Herrera; defendants Kulasooriya and Monvia appeared by their counsel Jake Molland; defendant New Moon appeared by its counsel Gregory Doyle and Thomas Crowell; and defendant Fernandes appeared by his counsel Mary Garfein. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS the motions in part and DENIES them in part.

INTRODUCTION

Plaintiff Suzanne Jackson, alleges that she was defrauded by defendant William Fischer ("Fischer"), who induced her to invest several million dollars in a number of unsound enterprises, resulting in the loss of her investments. Although plaintiff refers to an overall "scheme," the complaint in fact alleges a series of "schemes," which have in common primarily the fact of Fischer's involvement.

Plaintiff filed the original complaint in June 2011, against 18 defendants – Fischer; J. Sabes; S. Sabes; David Goldsteen; Siegel; Brian Campion ("Campion"); Lonnie Bookbinder ("Bookbinder"); Chetan Narsude; Kulasoorya; Joshua Rosen ("Rosen"); Upper Orbit LLC ("Upper Orbit"); SpeciGen, Inc. ("SpeciGen"); PeerDreams, Inc. ("PeerDreams"); Notebookz Inc. ("Notebookz"); iLeonardo.com, Inc. ("iLeonardo"); New Moon; Monvia; and Sazani Beach Hotel ("Sazani Beach").

The companies or businesses in which Fischer allegedly induced plaintiff to invest were SpeciGen, PeerDreams, Notebookz/iLeonardo (treated as a single entity in the complaint), New Moon, and Sazani Beach. Upper Orbit is alleged to have been a limited liability company through which Fischer funneled some of plaintiff's money.

On December 5, 2011, pursuant to stipulation, plaintiff filed the first amended complaint ("FAC"), against the same 18 defendants. On February 28, 2012, plaintiff filed a notice of dismissal as to defendant David Goldsteen.

In March 2012, plaintiff requested entry of default against SpeciGen, PeerDreams, and iLeonardo. Default was entered as to those three defendants on March 19, 2012.

In April 2012, Fischer filed for Chapter 7 bankruptcy protection in the District of Minnesota, asserting that he had \$12 million in liabilities, and listing plaintiff as the major creditor. On April 24, 2012, Fischer and Upper Orbit filed a notice of filing of bankruptcy petition, which triggered an automatic stay in this action as to Fischer.

On June 15, 2012, pursuant to stipulation (and after a number of defendants had filed motions to dismiss), plaintiff filed a second amended complaint ("SAC") in the present action, against 20 defendants. These are Fischer; J. Sabes; S. Sabes; Siegel; Campion;

1 Bookbinder; Kulasooriya; Fernandes; Rosen; Steve Waterhouse ("Waterhouse"); Jean Paul
2 a/k/a "Buzzy" Lamere ("Lamere"); SpecGen; PeerDreams; Notebookz; iLeonardo; New
3 Moon; Monvia; CII Ltd. ("CII"); Sazani Beach; and Upper Orbit.

4 J. Sabes, Siegel, and Campion are alleged to have been officers/directors of
5 SpecGen; S. Sabes is alleged to have been a director of SpecGen; Bookbinder is alleged
6 to have been the CEO of SpecGen; Kulasooriya is alleged to have been a director of
7 PeerDreams and New Moon, and a "co-adventurer" with Fischer; Fernandes is alleged to
8 have been a director of Monvia, the CEO of non-party MOIBucks, and a director of
9 PeerDreams and New Moon; Rosen is alleged to have been the CEO and a director of
10 Notebookz and iLeonardo; Waterhouse is alleged to have been a director of Notebookz;
11 Lamere is alleged to have been the president of non-party Toppost, and a "consultant" to
12 SpecGen; and Upper Orbit is alleged to have been a "corporate vehicle" used by Fischer
13 as a "broker-dealer" for New Moon, non-party Toppost, SpecGen, and PeerDreams.

14 On July 17, 2012, plaintiff filed an adversary proceeding in the District of Minnesota
15 Bankruptcy Court, challenging the dischargeability of Fisher's debt. The stay as to Fischer
16 in this case remains in place until resolution of the adversary proceeding. On July 19,
17 2012, the Bankruptcy Court issued an order discharging Fischer. The adversary
18 proceeding, which was originally set for trial on November 5, 2011, with a continuance to
19 September 16, 2013, was set for trial on December 9, 2013.

20 Meanwhile, default was entered against Upper Orbit in this case after it failed to
21 appear by counsel (having been ordered to do so). Plaintiff filed a motion for default
22 judgment, but that motion was denied on January 2, 2013, without prejudice to refiling once
23 the claims against Fischer have been resolved.

24 On March 15, 2013, the court issued an order granting the motions to dismiss the
25 SAC filed by four defendants/groups of defendants (J. Sabes, S. Sabes, and Siegel;
26 Kulasooriya and Monvia; New Moon; and Fernandes). The claims under § 10(b) and Rule
27 10b-5 were dismissed with prejudice as to J.Sabes, S. Sabes, Siegel, Kulasooriya, and
28 Fernandes.

On April 25, 2013, plaintiff filed the third amended complaint ("TAC"), against the same 20 defendants as in the SAC, asserting 11 causes of action –

(1) a claim under § 10(b) of the 1934 Securities Exchange Act and Rule 10b-5 promulgated thereunder (mistakenly labeled as a claim under the "1933 Securities Act"), against defendants Fischer, Campion, Siegel, Rosen, Kulasooriya, SpeciGen, PeerDreams, Notebookz, New Moon, and Toppost,¹ TAC ¶¶ 78-133;

(2) a claim under California Corporations Code §§ 25401 and 25501 (against SpeciGen, Notebookz, Ileonardo, PeerDreams, New Moon, Toppost, Fischer, Siegel, Campion, Rosen, and Kulasooriya), TAC ¶¶ 134-140;

(3) a "control person" claim under § 20 of the 1934 Securities Exchange Act (against J. Sabes, S. Sabes, Siegel, Campion, Fischer, Rosen, Waterhouse, Kulasooriya, Fernandes, Nancy Gruver², and Lamere (and also possibly Fischer, though that is not clear), TAC ¶¶ 141-145;

(4) a claim of "control person" or secondary liability under California Corporations Code § 25504 (against Siegel, J. Sabes, S. Sabes, Campion, Bookbinder, Rosen, Waterhouse, Fernandes, Kulasooriya, Gruver, and Lamere), TAC ¶¶ 146-154;

(5) a claim of breach of fiduciary duty (against Fischer, J. Sabes, S. Sabes, Siegel, Campion, Kulasooriya, Fernandes, Rosen, Waterhouse, and "directors of the other defendant companies whose names are not currently known"), TAC ¶¶ 155-161;

(6) a claim under California Corporations Code §§ 25230, 25235 (California Investment Advisors Code) (against Fischer only), TAC ¶¶ 162-169;

(7) a claim for declaratory judgment of breach of Investment Advisors Act of 1940 (against Fischer only), TAC ¶¶ 170-178;

¹ The court notes that Toppost is not named as a defendant in the "Parties" section of the TAC, that no summons was issued for Toppost, and that it thus undoubtedly was not served with process.

² The court notes that Nancy Gruver ("Gruver," alternatively, "Griver" – President of New Moon) is not named as a defendant, that no summons was issued for her, and that she undoubtedly was not served with process.

(8) a claim of negligent misrepresentation (against Fischer, J. Sabes, S. Sabes, Campion, Siegel, Rosen, and Kulasooriya), TAC ¶¶ 179-187;

(9) a claim under California Corporations Code § 25501.5 (against J. Sabes, S. Sabes, Siegel, Campion, Rosen, Fernandes, Kulasooriya, Waterhouse, and Gruver (not a defendant and not served)), TAC ¶¶ 188-195;

(10) a claim of common law misrepresentation (against “all defendants” or alternatively, against “Fischer and Upper Orbit as agents for the other corporate, officer and director defendants”), TAC ¶¶ 196-200; and

(11) a claim of respondeat superior (against Fischer, and possibly against J. Sabes, S. Sabes, Campion, Bookbinder, Siegel, Rosen, Waterhouse, Fernandes, Kulasooriya, Gruver, and Lamere), TAC ¶¶ 201-205.

On May 28, 2013, Campion, Notebookz, and Rosen filed an answer to the TAC. On May 29, 2013, Waterhouse filed an answer to the TAC. Bookbinder, Sazani Beach, CII, and Lamere have not appeared. Plaintiff has filed proofs of service showing service of the summons and original complaint on Bookbinder, Sazani Beach, and CII, but has not moved for entry of default as to those defendants.

No proof of service has been filed as to Lamere, and he is hereby DISMISSED from the action pursuant to Federal Rule of Civil Procedure 4(m), in accordance with the court's order of October 22, 2013 (Doc. 234).

On December 18, 2013, plaintiff filed a notice of entry of judgment in the adversary proceeding pending in the Bankruptcy Court in the District of Minnesota. Fischer stipulated that he is indebted to plaintiff in the amount of \$8,250,000, arising from investments solicited from plaintiff by Fischer on behalf of SpeciGen, Notebookz, PeerDreams, CII, New Moon, Sazani Beach, and Toppost; and further stipulated that such debt is non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

Presently before the court are four motions to dismiss, brought by (i) J.Sabes, S. Sabes, and Siegel (“D&O defendants”); (ii) Kulasooriya and Monvia; (iii) New Moon; and (iv) Fernandes, plus a separate motion to strike, brought by Kulasooriya.

BACKGROUND

The background facts alleged in the TAC are as described in the March 15, 2013 order granting the motions to dismiss the SAC, although the TAC includes additional details, in particular with regard to the first cause of action.

Plaintiff alleges that she met Fischer in October 2006. She asserts that after Fischer learned of her interest in learning to invest, particularly in companies with some social or other beneficial purpose, he suggested she invest in SpeciGen, which he claimed had valuable patents that would produce breakthroughs in the treatment of cancer. Plaintiff alleges that in December 2006, she made the first of what would be over \$3 million in "loans and investments in common stock and convertible promissory notes," beginning with a \$250,000 loan "in the form of a promissory note convertible into preferred stock issued by SpeciGen." TAC ¶¶ 39-43.

Following this \$200,000 loan, Fischer "acting with, through and as agent and broker for the other defendants, and later some of the defendants directly, proceeded to solicit loans and direct equity investments, directly or through defendant Upper Orbit" in SpeciGen, Notebookz/iLeonardo, PeerDreams, CII/Sazani Beach, New Moon, Toppost, and "Rate-It-All, later converted to Double Dutch." TAC ¶ 43.

Plaintiff alleges that she never received an offering circular, memorandum, or other disclosure document, and that instead, Fischer (and later defendants J. Sabes, S. Sabes, Siegel, and Kulasooriya, and non-party Gruver) "would orally inform [plaintiff] of the investment, tell her why it would succeed, [and] claim the sophisticated nature of some of the other investors." TAC ¶¶ 44-47. She claims that none of the defendants informed her of any risks and none provided any disclosure documents. TAC ¶ 49.

In February 2008, Fischer proposed that plaintiff loan Upper Orbit \$1 million, in exchange for interest at 8% plus 4% "interest in the profits realized by Upper Orbit" from "trading equities, making loans, and investing in private equity opportunities." TAC ¶ 58. However, plaintiff asserts, because Fischer provided no accounting, "it is not known whether he actually traded in public securities with the funds." TAC ¶ 60.

1 Plaintiff alleges that based on “[t]he incomplete records provided by Fischer,”
2 Fischer made new investments or loans on plaintiff’s behalf in New Moon, PeerDreams,
3 Specigen, and Toppost; and that based on statements made by Fischer at his deposition
4 (in the bankruptcy adversarial proceeding), New Moon, Peer Dreams, Specigen,
5 Kulasoorya, Fernandes, Campion, Siegel, and Lamere were aware that Upper Orbit was
6 trading for plaintiff’s account. TAC ¶ 61. She claims that these defendants “were
7 specifically advised by Fischer that [plaintiff] was Fischer’s partner and that the Upper Orbit
8 shares in their companies, as well as the loans made, were being purchased and made in
9 her behalf.” TAC ¶ 62. (Yet – “it is not known whether [Fischer] actually traded in public
10 securities with the funds [plaintiff placed with Upper Orbit,” TAC ¶ 60.)

11 Plaintiff asserts that in the summer of 2008, she became concerned about the
12 “trading account” and asked to have her funds returned, but that Fischer responded that he
13 did not have enough “liquidity,” and instead proposed a “restructuring” of the loans plaintiff
14 had made to Upper Orbit. TAC ¶¶ 63-64.

15 Through 2009, Fischer continued to represent to plaintiff that he was working
16 actively with Specigen, New Moon, PeerDreams, Toppost, and Notebookz to “turn it
17 around.” TAC ¶ 65. By mid-2009, plaintiff became concerned about missed loan
18 payments, and other matters, but she asserts that continuing into November 2010, Fischer
19 “assuaged her with reports about each defendant company that created the impression her
20 money was not lost.” TAC ¶¶ 66-67.

21 Plaintiff asserts that from the summer of 2008, and into the fall of 2010, Fischer, “on
22 behalf of all the other defendants,” presented claims of progress to assuage her concerns
23 about her “investments.” TAC ¶ 69 Plaintiff alleges that Fischer made the following
24 statements between August 4, 2008, and March 2010:

25 a. On August 4, 2008, Fischer reported he was meeting with a partner of
26 a venture fund to review the Specigen patent portfolio, and told plaintiff that he had
27 “pitched [the venture fund partner] about the hydrogen and now he has told partners at [the
28 venture fund] and they are totally gungho about Thermal biology research.”

1 b. Also on August 4, 2008, Fischer reported that on August 1st, he had
2 "signed a purchase agreement to sell the 50 shares of Sazani for \$500,000" and that "[w]e
3 close on the deal Oct. 1st."

4 c. On August 18, 2008, Fischer advised that he would "be in Duluth with
5 Mani [Kulasooriya] from Monvia . . . for the rest of the week" and that they would be "getting
6 ready for the New Moon site to launch . . . and raising funds from local investors."

7 d. On August 26, 2008, Fischer told plaintiff that "we are about to close a
8 deal with Mobilbucks [run by Fernandes] in Dubai."

9 e. On September 1, 2008, defendant Joshua Rosen reported, "This
10 morning Mashable ranks ILeonardo.com above Google notebook as the best Research
11 utility on the web."

12 f. On October 27, 2008, Fischer "passed along" Kulasooriya's report that
13 "the Dubai Cares deal signed" and that "[m]oney will start coming in by the end of week
14 and all of it by November." The "Dubai Cares" deal was allegedly represented as
15 enhancing the value of PeerDreams, a Monvia project in which plaintiff had invested
16 \$200,000.

17 g. In late November 2008, Fischer (now allegedly employed by New
18 Moon) wrote from Germany to say he was raising funds for New Moon in four German
19 cities and would be doing further fund raising in Spain the following week.

20 h. In December 2008, Fisher reported, "I think I have gotten us a \$300K
21 investment into SpeciGen . . . but time will tell . . . we are beginning to see the light of day
22 here."

23 i. In July 2009, Fischer advised that "we can get a deal completed" for
24 the sale of PeerDreams.

25 j. In August 2009, Fischer reported progress on a buyer for New Moon,
26 stating that "we might have acquisition sooner than later."

27 k. In January 2010, New Moon submitted what plaintiff terms "a rosy
28 report" through Fischer that "[w]e'll be moving forward in our plan to get a significant

1 strategic partner on-board in the next 6 months.”

2 I. In February 2010, Fischer reported progress on a “SpeciGen
3 acquisition.”

4 m. Also in February 2010, Fischer told plaintiff, “[W]e should have a deal
5 by the end of March to put PeerDreams on 3 of the Smithsonian websites!”

6 n. At the end of March 2010, after reviewing plaintiff’s overall
7 investments, Fischer said, “[N]ow that I have gotten things stabilized I am working on
8 generating growth and revenue. A few more months of heads down manic work and we’ll
9 start seeing some light in this tunnel.” TAC ¶ 69.

10 Plaintiff alleges that it was in “the summer of 2008” that she “became concerned
11 about the so-called ‘trading account’ and asked to have her funds returned.” TAC ¶ 63.
12 However, she also asserts that throughout the fall of 2010, she repeatedly sought
13 information about her “investments,” but that her efforts were frustrated by Fischer’s
14 “delays,” and his “failures to reply” and the “failure of the other defendant entities to reply,”
15 plus “his claims that he was having difficulty getting the companies to provide the requested
16 information,” and his claims that investments from other new partners was imminent. TAC
17 ¶¶ 70-71.

18 Plaintiff alleges that these “representations” were made by Fischer, or “transmitted
19 directly from” the other “defendants” for the purpose of buying time from plaintiff and
20 frustrating her ability to protect her interests. TAC ¶ 72.

21 Plaintiff asserts that starting in June 2010, Fischer began to report “problems,” such
22 as that “we are being cheated by . . . Fernandes.” TAC ¶¶ 73-74. She claims that the
23 “deals” that Fischer, SpeciGen, New Moon, PeerDreams, CII, MOBIbucks, and Toppost
24 had “held out as inducements for patience” did not come to fruition, and that “those facts”
25 were actively concealed from her. TAC ¶ 75.

26 She asserts that from the time of her first loan to SpeciGen in December 2006
27 through her investments in the late summer of 2008, she received only “sparse” reports,
28 and that her requests for information remained unanswered through the late fall of 2010.

1 She contends that those misrepresentations tolled the statute of limitations with respect to
2 all claims arising out of her subsequently disclosed economic losses through November
3 2010. TAC ¶ 76.

4 With regard to her investments in SpeciGen, Notebookz, iLeonardo, PeerDreams,
5 New Moon, and Toppost, plaintiff alleges as follows:³

6 (a) With regard to SpeciGen, plaintiff alleges that her investments were made
7 in “tranches.”⁴ She lists seven loans secured by promissory notes that she claims were
8 “convertible into” either common or preferred stock, at SpeciGen’s discretion, and which
9 were issued on various dates from December 1, 2006 to the summer of 2008. TAC ¶ 86.
10 She also asserts that in October and November 2006, Fischer (acting as SpeciGen’s
11 agent) made false and material oral representations about SpeciGen, see TAC ¶ 87; that
12 Fischer arranged for plaintiff to meet J. Sabes, S. Sabes, Campion, and Siegel in February
13 2007, and that at that meeting, “defendants” made certain optimistic, but false,
14 representations about SpeciGen, and omitted to include certain material facts regarding
15 SpeciGen’s current status and prospects, see TAC ¶¶ 88-90.

16 In particular, TAC ¶ 87 lists certain false statements allegedly made by Fischer (“as
17 agent for SpeciGen”), as follows –

18 (i) that SpeciGen’s technology was a “proven concept,” and that
19 (unidentified) publicly-traded pharmaceutical companies were interested in partnering or
20 licensing the technology, TAC ¶ 87(a);

21
22 ³ In addition, the TAC adds reasons that the asserted misrepresentations and
omissions were false or misleading.

23 ⁴ The court was unable to locate a clear definition of “tranches” that is applicable in this
24 case. This French word is used to describe “slices” or “portions” of structured debt securities
25 (such as pools of residential mortgage loans). The “slices” or “portions” can be divided and
26 sold separately to investors. One “slice” or “portion” might include notes that are considered
27 riskier (but which pay more) and another “slice” or “portion” might include notes that are
28 considered safer (but which pay less). See, e.g., U.S. v. McGraw Hill Companies, Inc., 2013
WL 3762259 at *1 (C.D. Cal. July 16, 2013); see also J. Downes & J. Goodman, Dictionary of
Finance and Investment Terms (Barron’s, 3d ed. 1991) (defining term as “risk maturity or other
classes into which a multi-class security, such as a collateralized mortgage obligation (CMO)
or a REMIC is split”). However, that definition does not seem relevant to the situation here.

1 (ii) that Series A round financing (as proposed to plaintiff) would be
2 sufficient to carry the company to its “exit strategy” – presumably the point at which it would
3 be sold at a profit, TAC ¶ 87(b);

4 (iii) that Specigen had an active “industrial research collaboration” with
5 a (unidentified) “prominent biotech company,” TAC ¶ 87(c);

6 (iv) that Specigen’s technology had been “validated” by a commercial
7 biotech company, TAC ¶ 87(d);

8 (v) that the Series A investment made by plaintiff consisted solely of
9 convertible promissory notes (with no disclosure that other investors had been offered
10 common stock on a match to the other investors’ convertible notes), TAC ¶ 87(e);

11 (vi) that the Series A round was fully subscribed and that the other
12 investors were sophisticated and had biotech startup knowledge, TAC ¶ 87(f);

13 (vii) that Specigen’s “exit strategy” (when plaintiff would presumably
14 recoup her investment) would come within 2-3 years, TAC ¶ 87(g); and

15 (viii) that Specigen had all the licenses and patents needed to
16 commercially develop its technologies, TAC ¶ 87(h).

17 (b) With regard to Notebookz/iLeonardo, plaintiff alleges that on two
18 occasions in 2007 she made loans, secured by convertible promissory notes, and that in
19 July 2007, those promissory notes were (at the election of Rosen and Notebookz)
20 converted into shares of preferred stock. TAC ¶ 94. She asserts that the purchases of the
21 convertible promissory notes was made following (or at) three meetings in February and
22 March 2007, at which Rosen and Fischer made presentations and mentioned that Google
23 was a likely future acquirer of Notebookz/iLeonardo.com; and that Fischer (and
24 “subsequently through written documentation, Rosen”) made false representations about
25 “the company” (not clear which of the two companies plaintiff is talking about) and its
26 prospects, and that Rosen promised to provide a balance sheet and unaudited statements
27 of income and cash flows, which did not happen. TAC ¶ 95-102.

28 (c) With regard to PeerDreams, plaintiff alleges that her investments were

1 made in a number of “tranches” – specifically referring to six convertible promissory notes
2 she purchased between January 2007 and June 2009, four of which were allegedly
3 converted into shares of PeerDreams common stock. TAC ¶ 103. She allegedly made the
4 investments in reliance on statements made at meetings in December 2006 and January
5 2007, at which time Fischer made certain false representations that were based on
6 information he had obtained from Monvia, Fernandes, and Kulasooriya. TAC ¶¶ 108-113.
7 Plaintiff asserts that PeerDreams was a “joint project” among defendants Fischer, Monvia,
8 Fernandes, and Kulasooriya, and was “aggressively promoted” by Monvia, and that
9 Monvia, Fernandes, and Kulasooriya had a “conflict of interest” with outside investors
10 because they profited whether or not the company succeeded. TAC ¶¶ 104-105. She
11 asserts that Fernandes and Kulasooriya were “founding directors” and (according to
12 Fischer’s deposition testimony) caused Monvia and PeerDreams to execute an agreement
13 under which Monvia would be responsible for fundraising and preparation of marketing and
14 investment plans, and would carry out the PeerDreams project. TAC ¶ 106. As such, she
15 claims, Monvia, Fernandes, and Kulasooriya provided information to Fischer as their agent
16 to communicate to plaintiff. TAC ¶ 107.

17 (d) With regard to New Moon, plaintiff alleges that in the summer of 2008,
18 Fischer invested \$300,000 of plaintiff’s “Upper Orbit funds” in New Moon’s common stock.
19 She asserts, based on Fischer’s deposition testimony, that Fischer “made it clear to
20 defendants New Moon, and defendants Gruver [not a defendant], Fernandes, and
21 Kulasooriya” that plaintiff was “his partner” and that the securities being purchased through
22 Upper Orbit were for her benefit. TAC ¶¶ 114-115. Plaintiff claims that in order to induce
23 her to purchase the New Moon securities, New Moon, Gruver, Fernandes, and Kulasooriya
24 provided information to Fischer orally and in writing that “they knew was for purposes of
25 being transmitted to [p]laintiff to induce her approval for the investment,” and included
26 marketing plans and projections, pro formas of anticipated revenues, budgets, timelines for
27 development, and “exit strategies.” TAC ¶¶ 116-117. She asserts that “[t]he materials” that
28 were conveyed to her via Fischer contained materially false and misleading statements

1 regarding New Moon's financial situation and prospects, TAC ¶ 117, and that New Moon
2 "through" Fischer also failed to disclose other materially adverse information regarding New
3 Moon, TAC ¶ 120. She asserts in addition that as part of its "inducement" to Fischer and
4 plaintiff, New Moon failed to disclose a conflict arising from its development contract with
5 Monvia, and also failed to disclose another conflict arising from their offer to Fischer to hire
6 him as a consultant with plaintiff's funds, to conduct fundraising in Silicon Valley. TAC ¶¶
7 118-119.

8 (e) With regard to non-party Toppost, plaintiff alleges that after obtaining
9 \$1.140 million from her for use through Upper Orbit, Fischer used "the funds" for an
10 investment in Toppost, a company set up by an old friend, defendant Lamere, who had
11 allegedly served time for counterfeiting, and who also had allegedly owed Fischer money
12 for ten years. TAC ¶ 122-124. Plaintiff asserts that Fischer made false representations
13 about Toppost's prospects and also about Lamere's alleged "special skills," and also failed
14 to disclose his prior relationship with Lamere, Lamere's criminal background, and the fact
15 that some of Toppost's operations were in violations of copyrights held by other companies.
16 TAC ¶¶ 126-129.

17 DISCUSSION

18 A. Legal Standard

19 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the
20 legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191,
21 1199-1200 (9th Cir. 2003). Review is limited to the contents of the complaint. Allarcom
22 Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). To survive
23 a motion under Rule 12(b)(6), a complaint must satisfy the pleading requirements of
24 Federal Rule of Civil Procedure 8 by providing a "short and plain statement of the claim
25 showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

26 The court must "accept all factual allegations in the complaint as true and construe
27 the pleadings in the light most favorable to the nonmoving party." Outdoor Media Group,
28 Inc. v. City of Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007). However, legally

conclusory statements, not supported by actual factual allegations, need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). The allegations in the complaint “must be enough to raise a right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations and quotations omitted).

A motion to dismiss should be granted if the complaint does not proffer enough facts to state a claim for relief that is plausible on its face. See id. at 558-59. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678 (citation omitted). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” Id. at 679. In the event dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. See In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005).

Finally, in actions alleging fraud, “the circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b). Under Rule 9(b), falsity must be pled with specificity, including an account of the “time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.” Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (citations omitted).

The allegations “must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.” Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001) (citation and quotations omitted). In addition, the plaintiff must do more than simply allege the neutral facts necessary to identify the transaction; he must also explain why the disputed statement was untrue or misleading at the time it was made. Yourish v. California Amplifier, 191 F.3d 983, 992–93 (9th Cir. 1999).

B. Defendants’ Motions

The SpeciGen director and officer defendants (“D&O defendants” – J. Sabes, S.

1 Sabes, and Siegel) seek an order dismissing the claims asserted against them (first
2 through fifth and eighth through eleventh causes of action), pursuant to Rule 12(b)(6) and
3 Rule 9(b).

4 Kulasooriya and Monvia seek an order dismissing the claims asserted against them
5 (first through fifth, and eighth through the eleventh – though possibly not the tenth – causes
6 of action), pursuant to Rule 12(b)(6) and Rule 9(b). Kulasooriya has also filed a separate
7 motion to strike the allegations against him in the first cause of action (violation of § 10(b)
8 of the 1934 Exchange Act), on the ground that claim was previously dismissed as to him
9 with prejudice.

10 New Moon seeks an order dismissing the claims asserted against it (first and second
11 causes of action) pursuant to Rule 12(b)(6) and Rule 9(b). New Moon also seeks an order
12 dismissing the remaining causes of action, to the extent that plaintiff is attempting to assert
13 any of them against New Moon. In addition, New Moon argues that plaintiff has added
14 considerable confusion to an already confusing complaint by failing to name New Moon's
15 president Nancy Gruver as a defendant, and failing to identify her in the section of the TAC
16 entitled "Parties," but then repeatedly referring to her as a defendant elsewhere in the TAC.
17 New Moon notes that Gruver is not a named defendant, has not been served, and is not a
18 party to this action.

19 Finally, Fernandes also seeks an order dismissing the claims asserted against him
20 (the third through fifth, ninth, and eleventh causes of action), pursuant to Rule 12(b)(6) and
21 Rule 9(b).

22 1. Claim under § 10(b) of the 1934 Securities Exchange Act, and Rule 10b-5

23 The D&O defendants assert that the first cause of action for violation of § 10(b) must
24 be dismissed because the TAC fails to specify the statement or statements alleged to have
25 been false or misleading with the specificity required by Rule 9(b) and the Private
26 Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (the "PSLRA"); because the
27 TAC fails to attribute any alleged false statement to any of the D&O defendants; because
28 the TAC fails to identify a material misstatement; because the TAC fails to plead facts

1 establishing that any misstatement was false or misleading when made; and because the
2 TAC fails to plead facts giving rise to a strong inference of scienter. They also note that the
3 court previously dismissed this claim against them with prejudice.

4 Kulasooriya/Monvia argue that this claim should be dismissed as to Koolasuriya,
5 based on the court's prior dismissal of the claim against him with prejudice. It is not entirely
6 clear whether the first cause of action is also asserted against Monvia, as the TAC does not
7 pray for relief against Monvia, but in any event, Monvia argues the claim is time-barred;
8 that plaintiff alleges no false statements made by Monvia and fails to state a claim based
9 on statements by Fischer, because Monvia was not the maker of the statements and there
10 is no aiding and abetting liability under § 10(b); that plaintiff fails to allege that Monvia owed
11 or breached any duty to disclose; that plaintiff fails to allege particularized facts sufficient to
12 create a strong inference of scienter against Monvia; that plaintiff does not allege reliance
13 on any statement or action of Monvia; and fails to allege that Monvia's conduct caused her
14 asserted loss.

15 Kulasooriya/Monvia assert in addition that plaintiff lacks standing to assert this claim
16 as to Monvia because she does not allege that she purchased any Monvia securities. They
17 also contend that the TAC fails to allege fraud with particularity as required by Rule 9(b);
18 and that the TAC should be dismissed under Rule 8 because it lacks a "short and plain
19 statement of the claim."

20 New Moon argues that the § 10(b) claim should be dismissed because it is time-
21 barred, and because plaintiff fails to allege facts showing that plaintiff was a purchaser of
22 securities from New Moon. New Moon contends that the Purchase Agreement shows that
23 the shares in New Moon were purchased by Upper Orbit, not by plaintiff.

24 New Moon also asserts that plaintiff fails to allege facts showing that New Moon
25 made any misrepresentations to plaintiff or that such false statements were made in
26 connection with the purchase of sale of a security. New Moon notes that at the hearing on
27 the motion to dismiss the SAC, plaintiff's counsel conceded that Fischer – not the individual
28 defendants – was "the speaker."

1 To state a claim for securities fraud under § 10(b) and Rule 10b-5, a plaintiff must
 2 plead a material misrepresentation or omission by the defendant; scienter; a connection
 3 with the purchase or sale of a security; reliance; economic loss; and loss causation.
 4 Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148, 157 (2008); see also Dura
 5 Pharms., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005).

6 At the pleading stage, claims under § 10(b) and Rule 10b-5 must satisfy both Rule
 7 9(b) and the requirements of the PSLRA. In re VeriFone Holdings, Inc. Sec. Litig., 704
 8 F.3d 694, 701 (9th Cir. 2012). Under the PSLRA, the complaint must plead both falsity and
 9 scienter with particularity. See Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 990
 10 (9th Cir. 2009). If the complaint does not satisfy the PSLRA's pleading requirements, the
 11 court, upon motion of the defendant, must dismiss the complaint. 15 U.S.C. § 78u-
 12 4(b)(3)(A).

13 Under the PSLRA – whether alleging that a defendant “made an untrue statement of
 14 a material fact” or alleging that a defendant “omitted to state a material fact necessary in
 15 order to make the statements made, in the light of the circumstances in which they were
 16 made, not misleading” – the complaint must “specify each statement alleged to have been
 17 misleading, the reason or reasons why the statement is misleading, and, if an allegation
 18 regarding the statement or omission is made on information and belief, . . . [must] state with
 19 particularity all facts on which that belief is formed.” 15 U.S.C. § 78u-4(b)(1).

20 A statement or omission is misleading in the securities fraud context “if it would give
 21 a reasonable investor the ‘impression of a state of affairs that differs in a material way from
 22 the one that actually exists.’” Berson v. Applied Signal Tech., Inc., 527 F.3d 982, 985 (9th
 23 Cir. 2008) (citation omitted). However, “vague claims about what statements were false or
 24 misleading [and] how they were false” are subject to dismissal. Metzler Inv. GMBH v.
 25 Corinthian Colls., Inc., 540 F.3d 1049, 1070 (9th Cir. 2008).

26 In addition, liability under Rule 10b-5 is limited to parties who actually “make”
 27 misstatements of fact. See Janus Capital Group, Inc. v. First Derivative Traders, 131 S.Ct.
 28 2296, 2302 (2011) (“One ‘makes’ a statement by stating it.”). The Supreme Court

1 expressly rejected an attempt to rely on common law agency principles to extend primary
2 liability to non-speakers under § 10(b). See id. at 2304. The motion by J. Sabes, S.
3 Sabes, Siegel, and Kulasooriya is GRANTED. The court notes that it previously dismissed
4 the § 10(b) and Rule 10b-5 claims against those defendants (and against Fernandes), with
5 prejudice, based on plaintiff's concession that Fisher was the only "speaker."

6 Monvia's motion is GRANTED. Plaintiff has not stated a claim against Monvia under
7 § 10(b) or Rule 10b-5, not least because she has identified no false statements made by
8 Monvia, and has alleged no facts that are sufficient to create a strong inference of scienter.
9 The court previously dismissed this claim against Monvia, stating that the dismissal was
10 with leave to amend assuming plaintiff could plead facts showing that someone affiliated
11 with Monvia made false and misleading statements in connection with the purchase or sale
12 of Monvia securities. The TAC fails to adequately plead a claim under § 10(b) or Rule 10b-
13 5, in accordance with the court's prior instructions, and thus the dismissal is with prejudice.

14 New Moon's motion is GRANTED. Plaintiff alleges that Gruver, Kulasooriya, and
15 Fernandes put together a presentation of false information regarding New Moon's financial
16 condition and business prospects – this appears to have been in the form of oral
17 communications – which they directed to Fischer, who then communicated the information
18 to plaintiff. However, she does not allege that New Moon or anyone at New Moon made
19 any false representations to her directly.

20 Moreover, the TAC does not allege that plaintiff purchased any securities from New
21 Moon, or that she currently owns any New Moon securities. Nor does the TAC allege
22 falsity with specificity, or allege facts sufficient to create a strong inference of scienter
23 (particularly given that no individual affiliated with New Moon is alleged to have made any
24 false or misleading statements to plaintiff). The dismissal is with prejudice.

25 Finally, with regard to the defendants' arguments that the securities fraud claims are
26 time-barred, the court finds that the question when plaintiff discovered the alleged
27 wrongdoing involves factual disputes and is thus not appropriate for decision on a Rule
28 12(b)(6) motion.

2. Claim under Corporations Code §§ 25401 and 25501

The D&O defendants argue that the second cause of action for violation of Corporations Code §§ 25401 and 25501 must be dismissed because the TAC fails to allege that any of those defendants made a false statement or omission in connection with a sale of securities; and because the TAC fails to allege that plaintiff was in privity with any of the D&O defendants.

Kulasooriya/Monvia assert that the claims under Corporations Code §§ 25401 and 25501 fail because they are time-barred; because the TAC does not allege that Kulasooriya or anyone at Monvia made an untrue statement of material fact or omitted to state a material fact in connection with the sale or purchase of a stock; and because the TAC fails to allege facts showing that plaintiff was in privity with Kulasooriya (because there is no allegation that plaintiff purchased any Monvia stock from Kulasooriya).

New Moon contends that the claims under Corporations Code §§ 25401 and 25501 fail because they are time-barred; and because there are no facts alleged supporting a purchase by plaintiff of any security from New Moon in California, and the only allegations as to sale of New Moon securities are that they were sold in Minnesota.

Corporations Code § 25401 prohibits misrepresentations in connection with a sale of securities. Section 25401 provides that:

It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

Cal. Corp. Code § 25401.

Section 25501 is a corresponding section that establishes a private remedy for damages and rescission based on § 25401 liability. See California Amplifier, Inc. v. RLI Ins. Co., 94 Cal. App. 4th 102, 109 (2001). Section 25501 provides, in pertinent part, that:

Any person who violates Section 25401 shall be liable to the person who purchases a security from him or sells a security to him . . . unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know . . . of the untruth or omission.

1 Cal. Corp. Code § 25501. Both § 25401 and § 25501 impose liability only on the actual
2 seller of the security. Apollo Capital Fund, LLC v. Roth Capital Partners, LLC, 158 Cal.
3 App. 4th 226, 253-54 (2007).

4 Defendants' motions are GRANTED. The TAC fails to allege any facts showing that
5 defendants made any material misstatement or omission in connection with the sale of
6 securities, as discussed above with regard to the § 10(b) and Rule 10b-5 claims; and also
7 fails to allege facts showing that plaintiff was in privity with the defendants, which is
8 required for a § 25501 claim. See id. at 252-54.

9 In the order granting the motion to dismiss the SAC, the court granted leave to
10 amend to the extent that plaintiff could allege that the defendants sold the securities in
11 question (to the extent there were even securities sold). Otherwise, the court stated, the
12 dismissal would be with prejudice.

13 In the TAC, plaintiff still fails to allege facts showing that any particular defendant
14 made any material misstatement in connection with the sale of securities, as all the
15 misstatements that are attributed to a particular individual are attributed to Fischer "as
16 agent for" the various companies in which he solicited investments from plaintiff. In
17 addition, the TAC does not allege that these defendants sold her any securities.
18 Accordingly, this cause of action is dismissed with prejudice as to defendants J. Sabes, S.
19 Sabes, Siegel, Kulasooriya, Monvia, and New Moon.

20 3. Claim under § 20(a) of the 1934 Securities Exchange Act

21 The D&O defendants and Kulasooriya contend that the third cause of action for
22 violation of § 20(a) of the 1934 Securities Exchange Act must be dismissed because the
23 TAC fails to establish a primary violation of the Exchange Act; and because the TAC fails to
24 allege that the D&O defendants exercised actual power or control over any primary violator.

25
26 Similarly, Fernandes argues that he cannot be a "control person" under § 20(a)
27 because each of the alleged misrepresentations was made by Fischer, over whom
28 Fernandes had no direct oversight or involvement; and because the TAC does not allege a

1 claim of primary liability against Monvia, PeerDreams, or New Moon, as plaintiff did not
2 purchase Monvia securities, and the PeerDreams and New Moon Securities she claims she
3 did purchase were purchased from Upper Orbit, not from the companies themselves.

4 The arguments in plaintiff's opposition are fairly confusing. First, she invokes
5 Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990), where the Ninth Circuit
6 recognized respondeat superior liability for a corporation under § 10(b) and Rule 10b-5
7 based on common law agency principles. See id. at 1576-78. This is a distinct basis of
8 liability from that imposed under Section 20(a), and is used primarily to impute the scienter
9 of individual corporate officers onto the corporation. See, e.g., Curry v. Hansen Medical,
10 Inc., 2012 WL 3242447 at *12-13 (N.D. Cal. Aug. 10, 2012). Here, however, plaintiff
11 appears to be attempting to impute the scienter of Fischer onto the individual corporate
12 officers such as the D&O defendants and Kulasooriya, in order to state a claim for control
13 person liability as to those defendants.

14 Moreover, rather than recite the factual basis for the "control person" allegations,
15 plaintiff simply "realleges those facts set forth" in TAC ¶¶ 99-117. Plaintiff appears to be
16 arguing that merely by virtue of defendants' positions as directors of their respective
17 corporations, they are liable as control persons as alleged in TAC ¶¶ 141-144. That
18 allegation might suffice if there were a viable allegation of a primary violation of § 10(b) or
19 Rule 10b-5 – which there is not, as explained above. Without more, an allegation that a
20 defendant sits on the board of directors is insufficient to support a claim for control-person
21 liability. See Paracor Fin. Inc. v. GE Capital Corp., 96 F.3d 1151, 1163 (9th Cir. 1996).

22 In the order dismissing the SAC, the court stated that given the lack of a viable
23 allegation of primary liability, the § 20 claim must be dismissed. The court added that "[t]o
24 the extent that plaintiff is seeking leave to allege liability based on a theory of respondeat
25 superior, that request is granted." The order did not give any directions as to how that
26 would be accomplished, stating only that there were no facts pled in the SAC showing that
27 the officer and director defendants were acting as agents of the primary violator. That
28 deficiency has still not been remedied.

1 Nevertheless, the court finds that the motions to dismiss the third cause of action for
2 control-person liability under § 20(a) of the 1934 Securities Exchange Act must be DENIED
3 without prejudice to raising the arguments again in a future motion. In order to maintain a
4 claim for control-person liability under § 20(a), a plaintiff must establish a claim of primary
5 liability. See Zucco, 552 F.3d at 990; No. 84 Employer-Teamster Joint Council Pension Tr.
6 Fund v. America West Holding Corp., 320 F.3d 920, 945 (9th Cir. 2003).

7 As stated above, plaintiff has not stated a claim of primary liability as to any
8 defendant that has moved to dismiss. However, given plaintiffs' concession that Fischer
9 was the only "speaker," the court cannot find, in Fischer's absence, that plaintiff is unable to
10 state a claim of control-person or secondary liability as to any of the officer or director
11 defendants.

12 4. Claim under Corporations Code § 25504

13 The D&O defendants and Kulasooriya assert that the fourth cause of action for
14 violation of Corporations Code § 25504 must be dismissed because the TAC fails to allege
15 an agency relationship between the D&O defendants and Fischer with the specificity
16 required by Rule 9(b); because the TAC fails to allege facts establishing that Specigen,
17 Fischer, or anyone else connected with Specigen made a material misstatement in
18 connection with a sale of securities; and because the TAC fails to allege that the D&O
19 defendants had knowledge or reasonable grounds to believe that Specigen, Fischer, or
20 anyone else was primarily liable for violations of §§ 25401 and 25501.

21 Fernandes argues that the § 25504 claim is time-barred, and that plaintiff has not
22 alleged sufficient facts to support tolling the running of the limitations period. Section
23 25504 is subject to an absolute limitations period of five years after the act or transaction
24 constituting the violation, or two years after the plaintiff's discovery of the facts constituting
25 the violation, whichever is first. Cal. Corp. Code § 25506(b). Fernandes notes that he was
26 not added as a defendant until June 15, 2012, at which point he contends the limitations
27 period had clearly run. He asserts further that he cannot be liable in any event, because he
28 did not control any underlying primary violation.

1 Plaintiff's opposition is brief and rather sketchy. She does not identify the facts
2 showing an agency relationship between any of the defendants and Fischer, or facts
3 showing that anyone made a material misrepresentation. It is not even clear to the court
4 what plaintiff is attempting to say in this section of the opposition.

5 Corporations Code § 25504 imposes "control person" liability or secondary liability
6 on those who assist others in primary violations under the California Securities Act.
7 Section 25504 provides that "every person" who directly or indirectly controls a person
8 liable under § 25501 or § 25503, plus

9 every partner in a firm so liable, every principle executive officer or director of
10 a corporation so liable, every person occupying a similar status or performing
11 similar functions, every employee of a person so liable who materially aids in
12 the act or transaction constituting the violation, and every broker-dealer or
13 agent who materially aids in the act or transaction constituting the violation,
are also liable jointly and severally with and to the same extent as such
person, unless the other person who is so liable had no knowledge of or
reasonable grounds to believe in the existence of the facts by reason of which
liability is alleged to exist.

14 Cal. Corp. Code § 25504.

15 In the order dismissing the SAC, the court found that plaintiff had alleged that
16 individual defendants were "in direct control of and directly involved in" the engagement of
17 Fischer as their "broker/agent" and knew he was soliciting plaintiff to invest in the securities
18 at issue, and were therefore liable to the same extent as Fischer. However, the court
19 noted, in the absence of a viable claim of primary liability, plaintiff could not state a claim
20 against the individual defendants for control person liability under § 25504 – particularly
21 given that the claims against the individual defendants were based solely on statements by
22 Fischer, which plaintiff failed to allege were false or misleading when made.

23 Here, plaintiff has still failed to allege a viable § 25501 claim of primary liability.
24 Nevertheless, the court finds that the motions to dismiss the fourth cause of action for
25 "control person" or secondary liability under California Corporations Code § 25504 must be
26 DENIED without prejudice to raising the arguments again in a future motion. While
27 § 25504 is broader than its federal law counterpart, there must nonetheless be an
28 underlying primary violation in order to impose liability on persons who control the primary

1 violator, or are in some other way connected with aiding in the act or transaction
 2 constituting the violation. See, e.g., Openwave Sys., Inc. v. Fuld, 2009 WL 1622164 at *7
 3 (N.D. Cal. June 6, 2009); Hellum v. Breyer, 194 Cal. App. 4th 1300, 1310-14 (2011); see
 4 also Arei II Cases, 216 Cal. App. 4th 1004, 1013 (2013). As stated above, given that
 5 Fischer was the only "speaker," the court cannot make a determination in Fischer's
 6 absence regarding whether plaintiff is able to state a claim for the required primary
 7 violation.

8 5. Claim of breach of fiduciary duty

9 The D&O defendants argue that the fifth cause of action for breach of fiduciary duty
 10 must be dismissed because the TAC fails to plead specific facts showing that any of the
 11 individual defendants acted in bad faith; because plaintiff lacks standing to bring a claim for
 12 breach of fiduciary duty because any harm suffered was suffered by the companies, and
 13 the only damage suffered by plaintiff was the loss of value of her investment; because
 14 plaintiff's derivative claim for breach of fiduciary duty conflicts with her direct claims for
 15 damages and rescission; and because the TAC does not allege that the individual
 16 defendants failed to implement a system of controls or consciously failed to monitor the
 17 operation of such system, as required for a "failure of oversight" claim under Delaware law.

18 Kulasooriya and Fernandes contend that the claim for breach of fiduciary duty fails
 19 because plaintiff does not allege that she was a shareholder of Monvia, PeerDreams, or
 20 New Moon at the time the complaint was filed, and thus lacks standing,⁵ and because the
 21 breach of fiduciary duty claim should have been brought as a derivative action.

22 Essentially, defendants argue, this claim must be dismissed because it was not
 23 brought as part of a derivative action. See Aronson v. Lewis, 473 A.2d 805, 809 (Del.
 24 1984), overruled on other grounds, Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

25 Defendants contend that where the gravamen of the complaint is harm to the corporation,

27 ⁵ Under Federal Rule of Civil Procedure 23.1, a derivative plaintiff is required to plead
 28 that she "was a shareholder . . . at the time of the transaction complained of" and is also
 required to retain ownership of the stock for the duration of the lawsuit.

or to the whole body of its stock and property without any severance or distribution among individual holders, the action is a derivative one. See Schuster v. Gardner, 127 Cal. App. 4th 305, 313 (2005). Moreover, the plaintiff may not bring a derivative action until she has made a demand on the board, or shown that such a demand would be futile.

The court finds that the motion must be GRANTED. The law of the state of incorporation governs the liabilities of directors and officers of a corporation. See Shaffer v. Heitner, 433 U.S. 186, 215 n.44 (1977). Here, the breach of fiduciary duty claim is asserted against the directors of four of the defendant corporations – SpeciGen, Notebookz, PeerDreams, and New Moon – and against "directors of other defendant companies whose names are not currently known." TAC ¶ 155. SpeciGen, Notebookz, and PeerDreams are all alleged to be Delaware corporations. TAC ¶¶ 19-21. New Moon is alleged to be a "company" that is "headquartered in Duluth, Minnesota." TAC ¶ 23.

Under Delaware law, a claim for breach of fiduciary duty requires proof of two elements – (1) that a fiduciary duty existed and (2) that the defendant breached that duty. Heller v. Kiernan, 2002 WL 385545 at *3 (Del. Ch. Feb. 27, 2002); see also Beard Research, Inc. v. Kates, 2010 WL 1644177 at *17 (Del.Ch. Apr. 23, 2010). Both officers and directors of a corporation owe a fiduciary duty. Id. The elements are similar under Minnesota law. See Conwed Corp. v. Employers Reinsurance Corp., 816 F. Supp. 1360, 1362 n.3 (D. Minn. 1993).

In the order dismissing the SAC, the court found that plaintiff had failed to allege facts supporting the elements of the claim, and moreover, that the pleading was so deficient that the court could not ascertain whether plaintiff was alleging that the defendants had breached their fiduciary duties to her individually, or that they had breached their fiduciary duties to the corporations.

In general, mismanagement that depresses the value of stock is a wrong to the corporation . . . to be enforced by a derivative action." Bokat v. Getty Oil Co., 262 A.2d 246, 249 (Del. 1970); see also Sax v. World Wide Press, Inc., 809 F.2d 610, 614 (9th Cir.1987) (depletion and diversion of corporate assets through mismanagement were

injuries to the corporation, and plaintiff stockholder could not bring individual action); Kramer v. Western Pacific Indus., Inc., 546 A.2d 348, 350-53 (Del. 1988) (breach of fiduciary duty, resulting in waste of corporate assets, harmed the corporation, and plaintiff stockholder could not bring an individual action).

In a derivative action, a stockholder brings suit on behalf of the corporation for harm to the corporation. Id. at 351. Because a derivative suit is being brought on behalf of the corporation, the recovery, if any, must go to the corporation. A stockholder who is directly injured, however, does retain the right to bring an individual action for injuries affecting his or her legal rights as a stockholder. Such a claim is distinct from an injury caused to the corporation alone. In such individual suits, the recovery or other relief flows directly to the stockholders, not to the corporation. Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1035-39 (Del. Supr. 2004).

Determining whether an action is derivative or direct is “sometimes difficult” and may have legal consequences. Id. at 1036.

[I]f an action is derivative, the plaintiffs are then required to comply with the requirements of Court of Chancery Rule 23.1, that the stockholder: (a) retain ownership of the shares throughout the litigation; (b) make presuit demand on the board; and (c) obtain court approval of any settlement. Further, the recovery, if any, flows only to the corporation. The decision whether a suit is direct or derivative may be outcome-determinative.

Id. A suit must be maintained derivatively if the injury falls equally upon all stockholders. Id. at 1037 (citing Bokat, 262 A.2d at 249). The rules in Minnesota are to the same effect. See, e.g., Kococinski v. Collins, 935 F.Supp. 2d 909, 915-18 (D. Minn. 2013); see also Popp Telecom, Inc. v. Am. Sharecom, Inc., 361 F.3d 482, 492 (8th Cir. 2004) (citing Wessin v. Archives Corp., 592 N.W.2d 460, 465 (Minn. 1999)); Potthoff v. Morin, 245 F.3d 710, 716-17 (8th Cir. 2001).

Here, the allegations in the fifth cause of action for breach of fiduciary duty are that the “defendant directors of each of the defendant companies had a fiduciary duty to the shareholders to manage the assets of their respective companies prudently, in good faith, and in the interest of the shareholders.” TAC ¶ 158. Plaintiff relies on boilerplate

allegations that the directors of SpeciGen (J.Sabes, S. Sabes, Siegel, Campion), New Moon (Kulasooriya, Fernandes), PeerDreams (Kulasooriya and Fernandes), Notebookz (Rosen and Waterhouse), and “the other defendant companies whose names are not currently known” “were privy to material information about [the] prospects, operations, capitalization, management, cash flows, capital structures, fund raising and other issues material to the fortunes of the defendant companies.” TAC ¶¶ 155-157.

The TAC also asserts in conclusory fashion that “[t]he defendant directors of each of the defendant companies had a fiduciary duty to their shareholders to manage the assets of their respective companies prudently, in good faith, and in the interest of the shareholders.” TAC ¶ 158; see also TAC ¶¶ 159-160. Plaintiff asserts that “[t]he defendant directors” breached their fiduciary duties and acted in bad faith by

(a) failing to oversee the use of funds by their companies, (b) failing to properly capitalize their companies, (c) engaging Fischer as their broker and fundraiser in a reckless manner that compromised the chances of the companies attracting further rounds of investors necessary to commercialize their products, (d) failing to enact and implement regular budgets to conserve and direct the prudent use of assets, (e) failing to keep the proper books and records necessary to attract future investors, (e) compromising further rounds of needed investment through the wholesale disregard of the laws of their respective states of incorporation, thereby imperiling the chances of ever creating companies that would be in a position to undertake public offerings that would return value to early stage and seed investors such as plaintiff Jackson, and (f) failing to timely report to Mrs. Jackson and other shareholders the material events impacting the companies, thereby concealing their mishandling of company assets.

TAC ¶ 161. These allegations all relate to mismanagement of corporate assets and to failure to comply with duties owed to the shareholders generally. Thus, any injury caused by this alleged breach of fiduciary duty would fall equally on all shareholders, and the claim must be asserted derivatively.

The court previously granted leave to amend this cause of action, and finds that the deficiencies cannot be remedied by further amendment. Accordingly, the dismissal is with prejudice.

6. Claims of negligent misrepresentation and common law misrepresentation
Defendants assert that the eighth cause of action for negligent misrepresentation

1 and the tenth cause of action for common law misrepresentation must be dismissed
 2 because the TAC fails to allege facts supporting the elements of those claims with the
 3 specificity required by Rule 9(b).

4 To state a claim for negligent misrepresentation, a plaintiff must allege (1) a
 5 misrepresentation as to a material fact; (2) without reasonable grounds for believing it to be
 6 true; (3) an intent to induce reliance; (4) justifiable reliance by the plaintiff who does not
 7 know that the representation is false; and (5) damage. In re Daisy Sys. Corp., 97 F.3d
 8 1171, 1180 (9th Cir. 1996). In addition, the existence of a duty of care is necessary to
 9 support a negligent misrepresentation claim. Alfus v. Pyramid Tech. Corp., 745 F.Supp.
 10 1511, 1523 (N.D. Cal. 1990) (liability for negligent misrepresentation may attach “only
 11 where plaintiff establishes that defendants breached a duty owed to him”); see also Garcia
 12 v. Superior Court, 50 Cal. 3d 728, 735 (1990).

13 To state a claim for fraud or intentional misrepresentation, a plaintiff must allege
 14 (1) a misrepresentation, (2) knowledge of its falsity, (3) intent to defraud, (4) justifiable
 15 reliance, and (5) resulting damage. Kearns v. Ford Motor Co., 567 F.3d 1120, 1126 (9th
 16 Cir. 2009) (citing Engalla v. Permanente Med. Grp., Inc., 15 Cal. 4th 951, 974 (1997)); see
 17 also Gil v. Bank of America, N.A., 138 Cal. App. 4th 1371, 1381 (2006).

18 As noted above, in federal court, allegations of fraud in civil cases are subject to the
 19 particularity requirements of Rule 9(b). That is, the pleader must state the time, place and
 20 specific content of the false representations as well as the identities of the parties to the
 21 misrepresentation. Swartz, 476 F.3d at 764; see also Vess v. Ciba-Geigy Corp. USA, 317
 22 F.3d 1097, 1106 (9th Cir. 2003) (averments of fraud must be accompanied by “the who,
 23 what, when, where, and how” of the misconduct charged). In addition, as the court
 24 previously noted in the order dismissing the SAC, where a plaintiff alleges that a defendant
 25 is liable for fraud under an agency theory, Rule 9(b) requires that the existence of the
 26 agency relationship be pled with particularity. See Swartz, 476 F.3d at 764-65. Here, the
 27 TAC does not allege facts showing the existence of an agency relationship. See, e.g.,
 28 RPost Holdings, Inc. v. Trustifi Corp., 2011 WL 4802372 at *3-4 (C.D. Cal. Oct. 11, 2011);

1 Palomares v. Bear Stearns Residential Mort. Corp., 2008 WL 686683 at *4-5 (S.D. Cal.
 2 Mar. 13, 2008).

3 Under California law, the tort of negligent misrepresentation is a “species of deceit.”
 4 See Bily v. Arthur Young & Co., 3 Cal. 4th 370, 407 (1992). The Ninth Circuit has not yet
 5 determined whether Rule 9(b)'s heightened pleading standard applies to a claim for
 6 negligent misrepresentation under California law, but the majority view among district
 7 courts in California appears to be that it does. See, e.g., Errico v. Pac. Capital Bank, N.A.,
 8 753 F.Supp. 2d 1034, 1049 (N.D. Cal. 2010) (negligent misrepresentation sounds in fraud
 9 and is subject to Rule 9(b) pleading requirements); see also In re Easysaver Rewards
 10 Litig., 737 F.Supp.2d 1159, 1176-77 (S.D. Cal. 2010); Neilson v. Union Bank of Cal., N.A.,
 11 290 F.Supp.2d 1101, 1141 (C.D. Cal. 2003).

12 The court finds that the motions must be GRANTED. Plaintiff has not met the
 13 elements of the claim and thus has not met the pleading requirements of Rule 8 or Rule
 14 9(b). Plaintiff addresses these two claims together, arguing that she has pled a “viable
 15 misrepresentation claim” as to all defendants by alleging a misrepresentation of past
 16 existing fact, an absence of reasonable grounds for believing it to be true, the intent to
 17 cause the other’s reliance on the misrepresentation, justifiable reliance, and consequential
 18 damage. She also claims that the “detailed itemized allegations” in TAC ¶¶ 84-85 fully
 19 establish the extent of the fraud.

20 Plaintiff alleges that Fischer made misrepresentations, acting as the agent for J.
 21 Sabes, S. Sabes, Siegel, Campion, Rosen, Waterhouse, Kulasooriya, and Fernandes; and
 22 that in the case of J. Sabes, S. Sabes, Campion, Siegel, Rosen, and Kulasooriya, the
 23 misrepresentations were made directly to plaintiff.

24 With reference to the present motions, however, the court finds that the TAC fails to
 25 allege with the particularity required by Rule 9(b) that the D&O defendants, Kulasooriya, or
 26 Fernandes made any specific misrepresentation to plaintiff, or that in making such a
 27 statement, that defendant lacked reasonable belief that it was true. The majority of the
 28 false statements are attributed to Fischer – not to the D&O defendants, Kulasooriya, or

1 Fernandes – or are unattributed. In the order granting the motion to dismiss the SAC, the
2 court granted leave to amend this claim, but “only to the extent that plaintiff can correct this
3 deficiency.”

4 Plaintiff may have stated a claim of negligent misrepresentation or common law
5 misrepresentation as to Fischer, but not as to the D&O defendants, Kulasooriya, or
6 Fernandes, because she has not identified any specific false statement made by any of
7 them, and has not alleged facts showing intent to induce reliance. Nor has she alleged the
8 existence of an agency relationship with the particularity required under Rule 9(b). The
9 dismissal is with prejudice.

10 7. Claim of violation of Corporations Code § 25501.5

11 The D&O defendants argue that the ninth cause of action for violation of
12 Corporations Code § 25501.5 must be dismissed because the TAC fails to allege that any
13 of the officer and director defendants participated in any transaction involving the sale of
14 securities or otherwise acted as a broker-dealer in the State of California; and because any
15 claim for relief under § 25501.5 is time-barred.

16 Kulasooriya/Monvia contend that the § 25501.5 claim fails because it is time-barred;
17 and because there is nothing to rescind because plaintiff alleges no facts showing that
18 Monvia ever sold her any securities, or that she ever purchased any Monvia securities.

19 New Moon asserts that the claim should be dismissed because there are no facts
20 pled showing that plaintiff “purchased” or “sold” a security and that the purchase or sale
21 was from or to an unlicensed broker dealer. Rather, New Moon notes, plaintiff alleges that
22 she invested money in Upper Orbit, a Minnesota limited liability company, which then in
23 turn purchased securities in its name from New Moon. Plaintiff was not part of the
24 transaction, and New Moon argues that for this reason she has no standing to assert a
25 claim under 25501.5.

26 Fernandes contends that this claim fails because it seeks to add a new cause of
27 action, in violation of an express provision in the statute (which entitles a plaintiff to rescind
28 the sale of a security, or if that is not possible because the plaintiff has already sold the

1 security, to seek damages). Here, Fernandes argues, he never sold any securities to
 2 plaintiff, and there is thus nothing to rescind, and the statutory remedy can never be
 3 achieved.

4 In opposition, plaintiff argues that “liability has been established” under § 25501.5.
 5 She asserts that the TAC alleges that Fischer was a broker-dealer; that “defendants” are
 6 secondarily liable for Fischer’s selling of securities without being a broker-dealer (and
 7 § 25501.5 does not require privity); and that issuer liability is “inherent” in § 25501.5.

8 The motion is GRANTED in part and DENIED in part. Section 25501.5, which is
 9 entitled “Action for rescission or damages,” provides in part that

10 [a] person who purchases a security from or sells a security to a broker-
 11 dealer that is required to be licensed and has not, at the time of the sale or
 12 purchase, applied for and secured from the commissioner a certificate . . .
 13 authorizing that broker-dealer to act in that capacity, may bring an action for
 14 rescission of the sale or purchase or, if the plaintiff or the defendant no longer
 15 owns the security, for damages.

16 Cal. Corp. Code § 25501.5(a)(1).

17 The TAC alleges that Fischer was “acting on . . . behalf” of the “individual and
 18 corporate defendants . . . to sell their securities.” TAC ¶ 189. Plaintiff alleges that “the
 19 individual and corporate defendants knew or should have known that Fischer was an
 20 unlicensed investment advisor,” and that they failed to disclose that fact to plaintiff “even
 21 though he was acting on their behalf to sell their securities.” TAC ¶ 189 (emphasis added).
 22 For this reason, she asserts, “defendants were . . . engaged in the promotion or sale of
 23 unregistered securities through Fischer.” TAC ¶ 190. Thus, she alleges, the individual
 24 defendants are “secondarily liable for Fischer’s sale of securities to [plaintiff] without being
 25 a duly registered broker-dealer,” which is unlawful under § 25501.5. TAC ¶¶ 191-192.

26 Under Corporations Code § 25004, the term “broker-dealer” means “any person
 27 engaged in the business of effecting transactions in securities in this state for the account
 28 of others or for his own account.” Cal. Corp. Code § 25004. It specifically excludes “any
 other issuer” and “an agent, when an employee of a broker-dealer or issuer” from the
 definition of “broker-dealer.” Cal. Corp. Code § 25004(a).

Plaintiff does not allege that she purchased securities from the individual defendants, or that any of the individual defendants are “engaged in the business of effecting transactions in securities in this state for the account of others or for his own account.” Cal. Corp. Code § 25004. Thus, to the extent that the TAC alleges a direct claim for relief under § 25501.5 against the individual defendants, the motion to dismiss is GRANTED. To the extent that the claim is asserted against New Moon or Monvia (not entirely clear from the TAC), there are no allegations that plaintiff purchased New Moon or Monvia securities from those companies directly (or, for that matter, from Fischer), and the motion is GRANTED.

Plaintiff's position appears to be that the individual defendants are secondarily liable for Fischer's alleged misconduct. As the court noted in the order granting the motion to dismiss the SAC, the courts are divided on the question whether a claim of secondary liability is cognizable under § 25501.5. In Viterbi v. Wasserman, 191 Cal. App. 4th 927 (2011), the court held that while a plaintiff who still holds a security can obtain rescission against a defendant who sold or owned the security, that remedy may not be invoked against control persons, aiders and abettors, or other persons who assisted in or were involved in the transaction, but who did not actually own the securities or sell them to the plaintiff. See id. at 935-43.

In Moss v. Kroner, 197 Cal. App. 4th 860 (2011), the court held that in enacting § 25504 and § 25504.1 (which impose liability on secondary actors jointly and severally with sellers), the Legislature intended to depart from the traditional requirement of contractual “privity” between the plaintiff and secondary actors.

If the relief that would be available from the primary actor under section 25501 would be rescission and the return of the money owing to the plaintiff, then the person who is secondarily liable is liable for the money required to make the plaintiff whole, even if he or she may not be capable of actual rescission because he or she was not a party to the contract.

Id. at 875–79. The court also noted, however, that while “control persons” need not be in privity with the plaintiff, privity is required to establish the underlying § 22501 claim. That is, “[t]he person alleged to be controlled by the defendants must be alleged to be in privity with

1 the plaintiffs." Id. at 875.

2 In the order granting the motion to dismiss the SAC, this court stated that Moss
3 appears to be the better-reasoned decision on this issue. The court also found that the
4 § 25501.5 claim might be time-barred, and granted leave to amend to clarify the basis on
5 which the individual defendants were being charged with liability, and to plead facts
6 sufficient to support the claim, and to show when the claim accrued.

7 In the TAC, plaintiff alleges that the D&O defendants are secondarily liable for
8 Fischer's sale of securities to plaintiff without being a registered broker-dealer; and that
9 prior to the end of 2010 (when she had lost the entirety of her investments) she had no
10 knowledge that her investments were lost (and indeed, prior to that time, "the named
11 defendants" concealed information from her, thereby making it impossible for her to
12 discover her losses).

13 As with the claims of "control person" liability, the court finds that in the absence of a
14 finding of primary liability, it is not possible to determine whether plaintiff can proceed
15 against the individual defendants on a theory of secondary liability. Thus, the motion is
16 DENIED on that basis.

17 In addition, however, the TAC still does not allege facts clearly showing when
18 plaintiff discovered the alleged violation. The TAC alleges that plaintiff discovered the
19 violation when she learned that she had lost her investments – but does not allege when
20 she discovered that she had purchased securities from an unlicensed broker-dealer. As
21 noted above, however, the question when plaintiff discovered the alleged violation appears
22 to raise factual issues that cannot be resolved on a Rule 12(b)(6) motion.

23 CONCLUSION

24 In accordance with the foregoing, the defendants' motions are GRANTED in part and
25 DENIED in part.

26 1. The motion to dismiss the claims under § 10(b) of the Securities Exchange
27 Act and Rule 10b-5 promulgated thereunder, asserted against J. Sabes, S. Sabes, Siegel,
28 Kulasoorya, Monvia, and New Moon, is GRANTED. The dismissal is with prejudice.

2. The motion to dismiss the claims under Corporations Code §§ 25401 and 25501 asserted against J. Sabes, S. Sabes, Siegel, Kulasooriya, Monvia, and New Moon is GRANTED. The dismissal is with prejudice.

3. The motion to dismiss the "control person" claims under § 20(a) of the Securities Exchange Act asserted against J. Sabes, S. Sabes, Siegel, Kulasooriya, and Fernandes is DENIED, without prejudice to raising the arguments in a future motion once the stay has been lifted as to Fischer.

4. The motion to dismiss the "control person" or secondary liability claims under Corporations Code § 25504 asserted against J. Sabes, S. Sabes, Siegel, Kulasooriya, and Fernandes is DENIED, without prejudice to raising the arguments in a future motion once the stay has been lifted as to Fischer.

5. The motion to dismiss the claim of breach of fiduciary duty asserted against J. Sabes, S. Sabes, Siegel, Kulasooriya, and Fernandes is GRANTED. The dismissal is with prejudice.

6. The motion to dismiss the claims of negligent misrepresentation and common law misrepresentation asserted against J. Sabes, S. Sabes, Siegel, Kulasooriya, and Fernandes is GRANTED. The dismissal is with prejudice.

7. The motion to dismiss the claim under Corporations Code § 25501.5, asserted against J. Sabes, S. Sabes, Siegel, Kulasooriya, Fernandes, Monvia, and New Moon is GRANTED to the extent that it alleges a direct claim for relief. The dismissal is with prejudice. The motion to dismiss the § 25501.5 claim asserted against J. Sabes, S. Sabes, Siegel, Kulasooriya, and Fernandes is DENIED to the extent it is based on secondary liability, without prejudice to raising the arguments in a future motion once the stay has been lifted as to Fischer.

8. The allegations against Nancy Gruver (or Griver) in the third, fourth, and ninth causes of action, and the allegations against Toppost in the first and second causes of action are STRICKEN, as no summons has been issued as to either Gruver/Griver or Toppost, and neither was named as a defendant in the "Parties" section of the TAC.

9. Based on the rulings in this order and what the court is able to ascertain from the allegations in the TAC, the claims remaining in the case are (a) the first cause of action (Securities Exchange Act § 10(b) and Rule 10b-5) against Fischer, Campion, Rosen, SpeciGen, PeerDreams, Notebookz; (b) the second cause of action (Cal. Corp. Code §§ 25401 and 25501) against SpeciGen, Notebookz, Ileonardo, PeerDreams, Fischer, Campion, and Rosen; (c) the third cause of action (Securities Exchange Act § 20(a) against J. Sabes, S. Sabes, Siegel, Campion, Fischer, Rosen, Waterhouse, Kulasooriya, and Fernandes; (d) the fourth cause of action (Cal. Corp. Code § 25504) against J. Sabes, S. Sabes, Siegel, Campion, Bookbinder, Rosen, Waterhouse, Fernandes, and Kulasooriya; (e) the sixth cause of action (Cal. Corp. Code §§ 25230 and 25235) against Fischer; (f) the seventh cause of action (declaratory judgment of breach of Investment Advisors Act) against Fischer; (g) the eighth cause of action (negligent misrepresentation) against Fischer, Campion, and Rosen; (h) the ninth cause of action (Cal. Corp. Code § 25501.5) against J. Sabes, S. Sabes, Siegel, Campion, Rosen, Fernandes, Kulasooriya, and Waterhouse; and (i) the tenth cause of action (common law misrepresentation) against Fischer and Upper Orbit

10. The parties shall meet and confer, and stipulate regarding when the stay as to Fischer will be lifted, and when the court should conduct an initial case management conference.

IT IS SO ORDERED.

Dated: December 20, 2013



PHYLLIS J. HAMILTON
United States District Judge